85-1416

No.

Supreme Court, U.S.
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1985

ARUBA BONAIRE CURACAO TRUST COMPANY LIMITED,
TRUSTEE OF THE SUPRIANO TRUST, et al.,
Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether, the dismissal by the United States Tax Court of eight cases brought by a trustee on behalf of four trusts seeking a redetermination of tax assessments exceeding $500,000 due to the trustee's inability to present evidence in a pretrial discovery hearing was "mandatory" under I.R.C. § 7456(b) given the special and unique circumstances present in this case (unexpected complex neurosurgery) which prevented the Trustee's crucial, and perhaps only, witness from testifying at the hearing.

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To The Honorable Chief Justice of the United States, and to The Associate Justices of the United States Supreme Court:

Petitioner Aruba Bonaire Curacao Trust Company Limited, Trustee of the Supriano Trust, et al. (hereinafter "Trustee") files this Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit which affirmed the dismissal of cases by the United States Tax Court in which Petitioners are seeking a redetermination of tax liabilities assessed against Trustee.

In support of the Petition, it is respectfully shown as follows:

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia has been officially reported ("the Opinion"). A copy of the Opinion is attached as Appendix A. Copies of the decisions of the United States Tax Court are attached as Appendix B. A copy of Petitioners' motion for rehearing is attached as Appendix C.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The Opinion of the Court of Appeals is dated and was filed and entered on November 22, 1985. Trustee filed a Petition for Rehearing on December 19, 1985. On December 31, 1985, the Petition for Rehearing was denied.

Jurisdiction to review the judgment of the Court of Appeals by writ of certiorari is conferred by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Internal Revenue Code of 1954, § 7456(b):

> (B) PRODUCTION OF RECORDS IN THE CASE OF FOREIGN CORPORATIONS, FOREIGN TRUSTS OR ESTATES AND NONRESIDENT ALIEN INDIVIDUALS—The tax court or any division thereof, upon motion and notice by the Secretary, and upon good cause shown therefor, shall order any foreign corporation, foreign trust or estate, or nonresident alien individual, who has filed a petition with the Tax Court, to produce, or, upon satsifactory proof to the Tax Court or any of its divisions, that the petitioner is unable to produce, to make available to the Secretary, and, in either case, to permit the inspection, copying, or photographing of such books, records, documents, memoranda, correspondence and other papers, wherever situated, as the Tax Court or any division thereof, may deem relevant to the proceedings and which are in the possession, custody or control of the petitioner, or of any

person directly or indirectly under his control or having control over him or subject to the same common control. If the petitioner fails or refuses to comply with any of the provisions of such order, after reasonable time for compliance has been afforded to him, the Tax Court or any division thereof, upon motion, shall make an order striking out pleadings or parts thereof, or dismissing the proceeding or any part thereof, or rendering a judgment by default against the petitioner. For the purpose of this subsection, the term "foreign trust or estate" includes an estate or trust, any fiduciary of which is a foregin corporation or nonresident alien individual; and the term "control" is not limited to legal control.

Tax Court Rule 104(c):

(c) Sanctions: If a party or an officer, director, or managing agent of a party or a person designated in accordance with Rule 81(c) fails to obey an order made by the Court with respect to the provisions of Rules 71, 72, 73, 81, 82, 83, 84, or 90, the Court may make such orders as to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the case in accordance with the claim of the party obtaining the order.

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the case or any part thereof, or rendering a judgment by default against the disobedient party.

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of the Court the failure to obey any such order.

Federal Rule of Civil Procedure 37(c)(2), in part:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party. . . .

STATEMENT OF THE CASE

This case has its origin in a bitter legal dispute fought in the Superior Court of Ventura County, California between the Trustee, a non-resident alien, on one side, and Douglas R. McAvoy ("McAvoy") and his real estate development companies on the other side (the "McAvoy Litigation"). The litigation lasted several years and terminated in 1978 with a favorable judgment for the Trustee. McAvoy and the Trustee reached a settlement wherein McAvoy agreed not to appeal the judgment and the Trustee agreed that McAvoy could pay the judgment in monthly installments commencing September 15, 1978 with a payment of $320,610 and concluding with a payment on February 1, 1979 of $161,502.[1] Before the November payment was made by McAvoy, the Internal Revenue Service ("IRS") issued assessments against the Trustee alleging that the Trustee owed taxes in the United States. The assessments were based on one of two theories, namely, that the Trustee was doing business in the United States, either in 1968 through 1973 when the obligations by McAvoy to pay the Trustee arose, or in 1978 when McAvoy paid

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[1] Schedule of Payments:

September 15, 1978	$320,610
October 2, 1978	$166,311
November 1, 1978	$165,109
December 1, 1978	$163,907
January 2, 1979	$162,705
February 1, 1979	$161,502

these obligations. The first theory was asserted in assessments made in October, 1978, while the latter theory was asserted in assessments made in January, 1979. These assessments led to the Tax Court cases which are the subject of this petition.[2]

During the pendency of these cases in the Tax Court, the IRS requested the production of certain documents and accountings. Pursuant to the IRS request, the Trustee turned over all documents it possessed. The Trustee produced 39 boxes of records. Additionally the Trustee reconstructed the accountings requested by the IRS. However, since original documentation had long ago been misplaced, the accounting reconstruction had to be made from secondary documents. The reconstructed accountings were provided to the IRS in 1982. The IRS was dissatisfied with the accountings and sought to have sanctions imposed upon the Trustee on the basis that the Trustee did not comply with the discovery orders.

The Court ordered a hearing with regard to the IRS' sanction request. Mr. Harry Margolis, former counsel to the Trustee in these cases and a person possessing intimate knowledge of the creation of each trust involved herein and each trust's operation with regard to McAvoy, was a crucial witness at the hearing. He was the only person who could adequately assist counsel in preparing for the hearing. Four days before the hearing, Mr. Margolis underwent a craniotomy to remove a malignant brain tumor. The Trustee requested a continuance of the hearing until such time as Mr. Margolis could meaningfully participate in preparation for the hearing and could also competently testify as a witness. The Tax court denied the Trustee's request for a continu-

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[2] In an effort to collect its assessments against the Trustee, the IRS demanded that McAvoy pay the remaining settlement amounts to the IRS. The IRS assessment were being challenged by the Trustee in litigation before the U.S. District Court for the Central District of California. McAvoy, faced with demands by both the Trustee and the IRS for payment of the remaining settlement amounts, protected himself by paying the amounts to the U.S. District Court. The money is being held by that Court to be paid to either the IRS or the Trustee, depending on who prevails in these cases.

ance, and, as a sanction for failing to go forward at the hearing, dismissed the Trustee's cases and entered decisions for the IRS.

The "McAvoy litigation" in Ventura County, California had its beginnings in 1963 when Customcraft Construction Company ("Customcraft") was developing residential property in Ventura County. McAvoy was operating the company. The company was in constant need of financing to purchase land for its building operations. The Trustee was one source of financing. The Trustee, on behalf of Trusts it managed, would occasionally acquire raw land and sell it to Customcraft for development.[3]

In 1967, the Trustee acquired some prime residential land. This land was owned by Las Posas Development Company ("Las Posas"), a corporation owned by two men named Woolsey and Hertel. The property became known as the Woolsey-Hertel property.

The Trustee purchased the stock of Las Posas and liquidated the company. The prime residential property was sold in liquidation to Customcraft for development. Customcraft was to pay for the property from the proceeds of home sales. However, in September, 1969, Customcraft renounced any and all obligations to the Trustee.

Protracted litigation soon followed. While the litigation proceeded, Customcraft continued to build out the Woolsey-Hertel property. However, instead of paying the Trustee for the land it purchased, Customcraft kept the proceeds from the home sales.

In 1973, the Trustee was sued by McAvoy for an accounting of the Durst Trust. The Trustee managed the trust, and McAvoy brought the action in his capacity as a beneficiary. The Trustee counterclaimed on behalf of the other Trusts which advanced the money for the acquisition of the Woolsey-Hertel property, namely, the Supriano, Shell, Berman, and Cole Trusts, Petitioners herein.

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[3] The Trustee was repaid from the proceeds of sales of the homes built by Customcraft. The Trustee had no offices in the United States nor did it participate at all in the building or sale of the homes. It merely arranged for sale of the property to Customcraft.

In 1975, the case was tried in the Ventura County Superior Court. The Court ordered the Trustee to render an accounting to McAvoy on the Durst Trust. The Trustee hired the international accounting firm of Pannell, Kerr & Fitzpatrick to prepare such an accounting. A chartered accountant in that firm, Mr. Paul T. Mason ("Mason"). was designated as the responsible accountant. He found that most of the Trustee's original records were missing. Apparently they had been lost. Therefore, Mr. Mason had to reconstruct the accounting essentially using the documents in evidence before the Ventura Superior Court.

Mr. Mason's reconstructed accounting was vigorously attacked by McAvoy because it showed a large receivable due to the Trustee from Customcraft. McAvoy claimed the accounting was inaccurate and incomplete. The trial court disagreed with McAvoy and found the accounting accurate and complete. The trial judge, among other things, specifically found:

> 5. Mason's accounting was based upon a thorough examination by him of the relevant books and records of the various entities involved in this action.
>
> 6. Mason's accounting was supported by the records of cross-complainant Customcraft Construction Company (hereinafter "Customcraft") and the accountings of Sheldon P. Lewis (hereinafter "Lewis") who has been both Customcraft's and McAvoy's independent certified public accountant since 1962.
>
> 7. Mason's testimony was concise, articulate and unequivocal. His research was thorough and followed usual accounting practices.
>
> . . . .
>
> 9. Mason is a qualified independent chartered accountant whose accounting is in full compliance with this Court's order of March 23, 1976. That accounting accurately reflects the financial position of the parties in this action to one another and fully accounts for all the charges and credits to the Durst Trust.

When the IRS requested the production of documents in the cases within, the Trustee's counsel at the time responded by providing 39 boxes of records. The majority of those files related to the "McAvoy litigation" during which thousands of documents were produced, reviewed, analyzed, and used as a basis of interrogation. While those files contained correspondence, memoranda and contracts, they did not contain trust agreements or accountings other than the Mason accounting. Those documents are missing, just as they were missing in the McAvoy Superior Court trial. Again, an effort was made to locate those documents for this litigation, but the effort was unsuccessful. Therefore, reconstructed accountings became necessary. Those were prepared and submitted to counsel for the IRS in October of 1982.

The IRS was not satisfied with the production of documents. The basic reason for the dissatisfaction is set forth in Judge Goffe's Order of March 23, 1983.

> Counsel for petitioners, past and present, have represented to the Court both orally at hearings and in written reports that certain documents which respondent seeks are not available. Some of the representations of counsel for petitioners are inconsistent. The record in the consolidated group of cases contains no admissible evidence to establish the existence or nonexistence of the documents which respondent seeks in his Motion to produce. There is no testimony by an officer or employee of petitioners that the records are missing or is there any testimony by a custodian of petitioners' records that he has made a search for the missing records and they cannot be located.
>
> On October 20, 1982, Harry Margolis, formerly counsel for petitioners, furnished to counsel for respondent a copy of a letter dated October 19, 1982, from Margolis to Robert Coffin, presently counsel for petitioners, by which he transmitted "accounting material" purportedly supplied by petitioners to Margolis with respect to the Berman, Shell, and Supriano trusts. There is no evidence in the record as to the source documents from which such documents were prepared. The documents furnished on October 20, 1982, are obviously not the documents sought by respondent in his

> motion to produce. In a status report filed with the Court on June 2, 1981, Mr. Margolis, then counsel for petitioners, advised the Court that a Mr. E. B. van Walsum, would reconstruct the documents requested by respondent from petitioners'; records located in Panama. It may logically be inferred that the documents furnished by Mr. Margolis to counsel for respondent on October 20, 1982, were prepared by Mr. van Walsum but there is no evidence in the record to establish the nature of the documents from which the documents transmitted on october 20, 1982, were prepared. An inference could be drawn that they were prepared from the very documents that respondent requested in his motion to produce. There is no evidence from Mr. van Walsum as to what documents of petitioners he has examined.

The IRS moved for sanctions against the Trustee for failure to produce documents. The IRS' motion for sanctions attached five documents. The IRS alleged that these documents required explanation in order to establish whether or not all documents were produced according to its request. These documents are attached to the IRS motion as Exhibits A through E and are as follows:

Exhibit A is a letter dated November 17, 1980 *signed by Harry Margolis.*

Exhibit B is a letter dated November 18, 1980 *signed by Harry Margolis.*

Exhibit C is a Status Report (undated) *signed by Harry Margolis.*

Exhibit D is a Status Report dated August 17, 1981 *signed by Harry Margolis.*

Exhibit E is a letter dated October 2, 1982 *signed by Harry Margolis.*

After several continuances, the Court ordered a hearing on the IRS motion to be held in Washington, D.C. on May 7, 1984.

On April 1, 1984, Mr. Margolis, the author of the five documents forming the basis for the IRS's motion for sanctions, and

the single most knowledgeable witness regarding these business transactions, suffered an unexpected seizure. A second seizure was suffered some ten days later. Subsequent to this seizure, Mr. Margolis was hospitalized for a number of neurological tests.

Soon thereafter, Mr. Margolis suffered a third seizure. He was again placed in the hospital. He was under heavy medication from the time entered the hospital until surgery was performed. He has virtually no recollection of any matters occurring between April 20th through most of the month of May.

At the time these seizures commenced, Mr. Margolis contacted Mr. Robert Dunnett, a local attorney who had previously been a member of his office and had worked on the McAvoy litigation in Ventura County. Mr. Margolis requested Mr. Dunnett to represent the Trustee at the May 7 hearing. For many years Mr. Margolis advised the Trustee with regard to United States litigation, and the Trustee relied upon Mr. Margolis to recommend and employ counsel for U.S. litigation.

Mr. Dunnett accepted the assignment and entered his appearance on behalf of the Trustee. Prior to the hearing, Mr. Dunnett attempted to meet with Mr. Margolis on several occasions in the hospital in order to prepare for the May 7 hearing. It was physically impossible for Mr. Margolis to prepare for the hearing, although in times of consciousness he requested the opportunity to travel to Washington to testify at the hearing and to otherwise assist counsel before undergoing surgery which the doctors had advised him was required to save his life. In an effort to obtain Mr. Margolis' testimony, arrangements were agreed upon between counsel for the IRS and Mr. Dunnett to have Mr. Margolis' deposition taken in his hospital room. However, it was impossible to proceed with the deposition because Mr. Margolis was placed under increasingly heavy sedation.

Without Mr. Margolis' assistance, Mr. Dunnett contacted counsel who previously represented the Trustee in these cases and attempted to prepare for the May 7, 1984 hearing. Mr. Robert Coffin, Ms. Christine Frahm, Mr. Louis Goebel and Mr. Dunnett met for several hours in an attempt to properly prepare the case without Mr. Margolis there to assist them, and with the realiza-

tion that Mr. Margolis would not be available to testify as a witness at the hearing. It became obvious that it was impossible to properly prepare and present any matter at the May 7 hearing without the assistance of Mr. Margolis. He signed the documents upon which the IRS' motion to impose sanctions was based and was the single individual with the knowledge of the total background in this matter.

Mr. Margolis underwent cranial surgery for the removal of a malignant brain tumor on May 3, 1984.

Under the circumstances, it was apparent that no proper presentation could be made by the Trustee on behalf of the beneficiaries they represented without the presence and assistance of Harry Margolis. Due to great distance between Los Gatos, California and Washington, D.C., the firm of Arent, Fox. Kintner, Plotkin & Kahn, was contacted by Robert Dunnett and retained to advise the Court on the morning of May 7, 1984 of the status of matters and request a continuance until Mr. Margolis could recover from the surgery. Counsel for the IRS was advised on Friday, May 4, 1984 that a motion for continuance would be made on Monday, May 7.

On May 7, 1984, the Tax Court refused to continue the hearing and imposed the sanction of dismissal. At the time these sanctions were imposed, Mr. Margolis was in a California hospital struggling to recover from a craniotomy performed four days earlier to remove a metastic malignant tumor. He was also suffering from chronic hypocalcemia from Crohn's disease and probably had prostate gland cancer. His life was expected to be shortened by these malignant conditions. The orders of dismissal and decisions were entered on June 15, 1984.

REASONS FOR ALLOWANCE OF THE WRIT

The question presented for review, *ante.*, sets forth an important issue regarding the interpretation and application of federal income law under a statute (I.R.C. § 7456(b)) enacted in 1982 which under certain circumstances authorizes the dismissal of a case before the litigant has an opportunity to be heard.

The question is whether, in the circumstances described herein, i.e. the unexpected, temporary unavailability of a crucial witness and legal representative of the Trustee in a United States Tax Court discovery hearing is the situation under which the new statute mandates and requires a dismissal of the Trustee's cases.[4] On this issue, the Petitioning Trustee's position is negative because under these circumstances the statute should not be interpreted to impose upon litigants a hardship which denies them access to the judicial system.

> "The parties have not cited, and our research has not revealed, any cases in which the Tax Court has resorted to § 7456(b). The section was added the the tax code when the Internal Revenue Code of 1954 was enacted. The legislative history of the section, however, provides us with no insight into the more subtle aspects of the section. Both the House and Senate Reports on the 1954 Code merely repeat the essential provisions of § 7456(b). H.R. Rep. No. 1337, 83d Cong., 2d Sess. A433 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 613 (1954)." (Opinion, Appendix A, p. 16)

The Tax Court's dismissal of the Trustee's cases is the first time this Section has been imposed to deny a litigant his day in court.[5] No reported cases have assisted the parties or the Court of Appeals of the District of Columbia in determining the application of this statute. The legislative history also provides no insight into its application.

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[4] This is not the usual Tax Court situation where the petitioner retains possession and control of revenue that the IRS alleges is due in taxes. The IRS had already sought to seize the monies and the funds are being held by a United States District Court. (See Footnote 2.)

[5] The Tax Court's orders refer to Tax Court Rules and Procedure Rule 104(c) as the basis for its orders. The IRS motions were brought under I.R.C. § 7456(b). This petition requests review of the propriety of dismissal orders made under 104(c) as well as under I.R.C. § 7456(b). This is the first time the District Court of Appeals for the District of Columbia has reviewed a Tax Court dismissal under § 104(c) utilizing guidance of cases under Federal Rules of Civil Procedure 37 (Opinion, Appendix A, p. 12).

I.R.C. § 7456(b) states, in part, "... If the petitioner fails or refuses to comply with any of the provisions of such order, after *reasonable* time for compliance has been afforded to him...." (emphasis added)

Reasonableness should not be determined by chronological measures alone. Reasonableness must look to all of the circumstances involved. Here, "reasonableness" should have provided the petitioning Trustee with a brief continuance to present the testimony of its crucial witness at the discovery hearing.[6]

The new statute includes a standard of reasonableness. Is that standard to be governed by an interpretation which deems unreasonable the inability of a petitioner to produce a crucial witness from a hospital room over 3,000 miles away from the discovery hearing? Is that standard to be governed by an interpretation which deems unreasonable a request for a brief continuance while a crucial witness convalesces from unexpected, complex neurosurgery?

In this case, Petitioner's crucial witness suffered completely unexpected seizures which required immediate medication and surgery. The medication used to control the seizures before surgery eliminated any opportunity for communicating with the witness to assist in preparation for the hearing; and the surgery and required convalescence prohibited the appearance of the witness at the hearing. Petitioners believe that the interpretation utilized by the District Court of Appeals for the district of Columbia was not the intent of the legislation. The statute cries out for interpretation to guide its application in the courts.

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[6] Even under the circumstances described herein, it was apparently the Tax Court's intent to continue the hearing as to Margolis alone. This intent was not carried out in the decisions. "This explains both the [Tax] Court's willingness to hold the record open for Mr. Margolis and the [Tax] Court's refusal to continue the hearing as to other witnesses." (Opinion, Appendix A, p. 11)

CONCLUSION

For all of the reasons stated above, this Petition for writ of certiorari should be granted.

Respectfully submitted,

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(Appendices follow)

Appendix A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5698

ARUBA BONAIRE CURACAO TRUST COMPANY LIMITED, TRUSTEE OF SUPRIANO TRUST, et al., APPELLANTS

v.

COMMISSIONER OF INTERNAL REVENUE, APPELLEE

Appeal from the Tax Court
of the United States

Argued October 2, 1985

Decided November 22, 1985

Robert L. Dunnett, for appellants.

Jonathan S. Cohen, Attorney, Department of Justice, of the bar of the Supreme Court of Connecticut, *pro hac vice*, by special leave of Court, with whom *Glenn L. Archer, Jr.*, Assistant Attorney General, and *Michael*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

L. Paup, Attorney, Department of Justice, were on the brief for appellee.

Before ROBINSON, *Chief Judge*, WALD, *Circuit Judge*, and MCGOWAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge*: In this case, the Tax Court dismissed appellants' pending actions as a sanction for failure to present evidence at a discovery hearing. Because we find that the Tax Court had authority to dismiss these actions and did not abuse its discretion in so doing, we affirm.

I. THE FACTS

A. *The Underlying Tax Dispute*

Aruba Bonaire Curacao Trust Company, Limited ("ABC") is the non-resident alien trustee of the four trusts that are the subject of this action. Pursuant to its duty to manage the trusts' assets prudently, ABC invested in several land development projects in California. Unfortunately, these investments soured and ultimately produced a lawsuit in which ABC was the defendant. ABC counterclaimed, however, and won a judgment of $1,108,804.70 from the original plaintiff in the action. ABC agreed that the plaintiff could pay this sum in six monthly installments.

Before the plaintiff had paid the third installment, however, the Commissioner of Internal Revenue ("Commissioner") entered the picture. The Commissioner issued deficiency assessments against ABC, alleging that the trusts owed taxes for several years during which they were doing business in the United States. These assessments amounted to $129,549.56. The Commissioner therefore demanded that the plaintiff in the California litigation pay all sums still owing on the judgment di-

rectly to the Internal Revenue Service. Realizing that competing parties had claims to the funds, the plaintiff paid the remaining portion of the judgment into the United States District Court for the Central District of California. That court is currently holding the funds, pending resolution of the tax dispute.

B. *The History of Discovery*

Since this case has taken such a tortuous path of delays, and those delays form the basis for the orders under review here, it is best to summarize the facts by year.

1979-1980

On April 16, 1979, ABC filed petitions with the Tax Court for review of the Commissioner's determination with respect to each trust. By April 1, 1980, the parties in the case were ready to prepare for trial. On that date, the Commissioner informally requested the production of several relevant documents. On April 11, 1980, ABC responded with "all of the material we have in these matters." Joint Appendix ("J.A.") at 26. Apparently, these materials were produced in the California litigation. Dissatisfied with ABC's response, the Commissioner proceeded on more formal lines. On May 16, 1980, the Commissioner filed a motion to produce the requested documents pursuant to I.R.C. § 7456(b) (1982).[1]

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[1] I.R.C. § 7456(b) (1982) provides, in part:

> The Tax Court or any division thereof, upon motion and notice by the Secretary, and upon good cause shown therefor, shall order any foreign corporation, foreign trust or estate, or non-resident alien individual, who has filed a petition with the Tax Court, to produce, or, upon satisfactory proof to the Tax Court or any of its divisions, that the petitioner is unable to produce, to make available to the Secretary, and, in either case, to permit the inspection, copying, or photographing of, such books, records, documents, memoranda, correspondence and

After one continuance requested by ABC, the Tax Court held a hearing on October 16, 1980. At that hearing, the Tax Court judge ordered the appellants to respond to the government's points and authorities submitted in support of the motion to produce. The appellants never filed a written reply because counsel for the appellant, Mr. Harry Margolis, represented that he was making progress obtaining the documents requested by the Commissioner.

1981

In response to this development, the Tax Court ordered Mr. Margolis to submit a status report to the court on March 24, 1981. J.A. at 40. On May 6, 1981, the Tax Court ordered Mr. Margolis to:

> submit a detailed, written report containing the following information: (1) the whereabouts of the records and documents requested by respondent [the Commissioner], (2) a description of what actions petitioner's counsel is presently taking to secure such records and documents, and (3) a specific timetable as to when the Court may expect such records and documents to be produced. This report shall be filed with the Court no later than June 1, 1981.

J.A. at 41.

On June 2, 1981, Mr. Margolis filed his status report, representing that the original trustee, now located in

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other papers, wherever situated, as the Tax Court or any division thereof, may deem relevant to the proceedings and which are in the possession, custody or control of the petitioner, or of any person directly or indirectly under his control or having control over him or subject to the same common control. If the petitioner fails or refuses to comply with any of the provisions of such order, after reasonable time for compliance has been afforded to him, the Tax Court or any division thereof, upon motion, shall make an order striking out pleadings or parts thereof, or dismissing the proceeding or any part thereof, or rendering a judgment by default against the petitioner.

Panama, had agreed to reconstruct the requested records. The individual apparently able to do so, however, was ill and could not presently perform the task. Since no immediate timetable was discernible, Mr. Margolis moved for an indefinite postponement. Mr. Margolis' report, however, for the first time implied that the original records were no longer available. This was inconsistent with his representation at the October 1980 hearing. The court ordered a postponement for a "reasonable length of time to enable petitioners to secure the necessary trust records." J.A. at 42. The court also ordered another status report, due by August 14, 1981.

Mr. Margolis filed his next status report on August 17, 1981. In this report, Mr. Margolis informed the Commissioner and the court that the individual in Panama who was to reconstruct the records had been in the hospital for an extended period. Moreover, there were new difficulties in securing the trust records. The trust company had been totally inactive for some time and did not have any employees who had any connection with events prior to 1978. Thus, Mr. Margolis moved for a further extension, which was granted.

1982

On February 11, 1982, Mr. Margolis moved for leave to withdraw as counsel, substituting Mr. Robert Coffin. On March 22, 1982, the Commissioner moved the Tax Court to set May 21, 1982 as the final date for production of the documents, pursuant to I.R.C. § 7456(b). The Commissioner asserted that a reasonable time had passed since its original motion (one year, ten months). J.A. at 50.

On October 4, 1982, the Tax Court held a hearing on this motion. The court ordered ABC to produce the documents by October 18, 1982. Moreover, the court set the case for trial on May 16, 1983. J.A. at 61.

On October 20, 1982, two days after expiration of the allotted time to produce the documents, the Commissioner received several documents from Mr. Margolis, who was no longer counsel in the case. The Commissioner found none of these documents responsive, and moved for the sanction of dismissal pursuant to I.R.C. § 7456(b) on November 2, 1982. J.A. at 62.

1983

On March 16, 1983, the Tax Court held a hearing on the Commissioner's motion. The court allowed the appellants to move for a evidentiary hearing to respond to the government's allegations. The appellants so moved, representing that they proposed to bring many witnesses to the court to prove that the requested documents were lost, thus excusing compliance with the motion to produce. Among the witnesses counsel planned to call (if available) were representatives of ABC from Panama, former officers of ABC (including eight named former employees), accountants (including six named individuals), a former custodian of the records, the plaintiff in the California litigation, attorneys in that litigation, Mr. Margolis, and an expert witness (all named). All told, ABC's attorneys listed nineteen potential witnesses. As this motion indicated, many identifiable individuals could have testified regarding the records the government sought. In light of this representation, the Tax Court postponed trial and set an evidentiary hearing for June 6, 1983.

As far as we can tell from the record, that evidentiary hearing did not occur in June of 1983. On June 6, the hearing was continued; on July 18, it was continued again. It was continued yet a third time on October 31, 1983.[2]

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[2] In the meantime, Ms. Christine Frahm entered an appearance for ABC.

1984

Finally on February 21, 1984, the Commissioner moved to set a date for the hearing.[3] ABC did not object to this, and the hearing was set for May 7, 1984 in Washington. On May 7, four years after the Commissioner filed the original motion to produce, ABC was not prepared to go forward. It is the outcome of that hearing that is before us in this case.

C. *The May 7, 1984 Hearing and Subsequent Dismissal*

On April 1, 1984, Mr. Margolis fell ill. Soon thereafter, doctors hospitalized him and placed him under heavy medication. It soon became apparent to ABC's attorneys that he would not be able to appear at the evidentiary hearing. The lawyers evidently deemed this development a serious blow to ABC's strategy, for Mr. Margolis was to testify about the existence of the documents on the basis of his intricate knowledge of the trusts. Mr. Margolis requested Mr. Dunnett, a former associate, to represent the trusts at the hearing. Mr. Dunnett was the fifth attorney to represent ABC in this litigation. Mr. Dunnett interviewed Mr. Margolis in an attempt to prepare, but he soon realized that Mr. Margolis' memory and speech were greatly affected by his medication. When this path became blocked. Mr. Dunnett approached all of the attorneys who had previously represented ABC in an attempt to prepare for the hearing. Soon, it became obvious to all that this too was fruitless.

On April 30, one week prior to the evidentiary hearing, Mr. Dunnett, Mr. Denier—counsel for the Commissioner—and the Tax Court judge held a conference call. During that telephone conversation, the judge expressly stated that he would not continue the May 7 hearing. Mr. Dunnett did not state that Mr. Margolis'

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[3] On February 22, 1984, Mr. Louis E. Goebel appeared for ABC. Mr. Goebel was the fourth attorney to represent ABC in this action.

presence at the hearing was crucial because of Mr. Margolis' legal talents. Rather, Mr. Margolis was to be only a witness in the hearing. The Tax Court judge had been informed of Mr. Margolis' sickness but stated that he would not grant a continuance. The Tax Court did offer to hold the record open beyond the May 7 hearing date in order to add Mr. Margolis' subsequent testimony. But the court made it clear that the hearing would go forward with or without Mr. Margolis.

On May 7, Mr. Dunnett officially entered his appearance on behalf of ABC, as did Mr. Harlee, a Washington lawyer. Mr. Harlee appeared alone at the hearing and asked for a continuance. The court denied the motion, stating:

> I would like the record to show that [sic] the conference call with Mr. Dunnett and Mr. Denier, on April 30th, I made it quite clear that I would not continue this hearing. And that if Mr. Margolis' testimony were needed that I would consider holding the record open after the hearing to take his testimony. At that time no claim was made by Mr. Dunnett that Mr. Margolis's presence was necessary to try the case, except as a witness. He made no claim that Mr. Margolis had to be present at the hearing as an attorney. At that time I made it clear that I expected Mr. Dunnett to provide the Court with an offer of proof as to what evidence Mr. Margolis would testify to or what evidence he would offer. That has not been furnished to the Court.
>
> In the file there are statements by Mr. Coffin as to the witnesses he intends to call at this evidentiary hearing. It would appear to me that if Mr. Coffin is representing to the Court that he knows how to proceed and he knows who to call as witnesses that there is no excuse for Mr. Coffin not appearing to present this matter.
>
> Mrs. Frahm entered her appearance in this case. She hasn't seen fit to withdraw or explain why she isn't ready to proceed with this hearing.

> All we have now is another attorney entering his appearance the morning of the hearing asking for a continuance because Counsel isn't prepared.
>
> This discovery motion was filed on us four years ago. And this Court and Respondent have patiently waited for this evidence—this information and it has not been forth coming. The Court will deny Petitioners [sic] motion for continuance.

Appellant's Br. App. ("App.") at 60-61.

On June 15, 1984, the Tax Court entered orders granting the Commissioner's November 12, 1982 motion for sanctions, pursuant to Tax Court Rule 104(c). The cases were dismissed.

Our jurisdiction to review the Tax Court's order is based on 26 U.S.C. § 7482 (1982).

II. *Analysis*

As a preliminary matter, we have some difficulty discerning the authority upon which the Tax Court relied in dismissing this case. The Commissioner's motion for sanctions clearly relied on I.R.C. § 7456(b). That section empowers the court to strike pleading or dismiss a case against a foreign trust that fails to produce relevant records.[4] The orders of dismissal explicitly granted the Commissioner's motion, which was based on § 7456(b). *See* App. at 66-73. Nevertheless, the court dismissed the cases "pursuant to Rule 104(c), Tax Court Rules of Practice and Procedure." *Id.* Tax Court Rule 104(c) gives the court discretion to impose sanctions for failure to obey a discovery order. The court has the discretion to render "[a]n order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the case or any part thereof, or rendering a judgment by default against the disobedient

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[4] *See supra* note 1.

party."[5] ABC contends that the case was dismissed under the authority of Rule 104(c), while the Commissioner asserts that the basis of the dismissal is I.R.C. § 7456(b).

The orders of dismissal are sufficiently ambiguous that we cannot determine under which authority the Tax Court decided the case. Nevertheless, we affirm the dismissal as proper because both Tax Court Rule 104(c) and I.R.C. § 7456(b) empower the Tax Court to dismiss this particular case. We first review the propriety of the court's refusal to continue the hearing. We then examine the dismissal under Rule 104(c), and under I.R.C. § 7456(b).

A. *The Denial of a Continuance*

The decision to continue consideration of a motion lies in the sole discretion of the trial court, and this court will not set aside a ruling thereon without a clear showing of abuse of that discretion. *Kelberine v. Societe Internationale, Etc.*, 363 F.2d 989 (D.C. Cir.), *cert. denied*, 385 U.S. 989 (1966); *Chung Wing Ping v. Kennedy*, 294 F.2d 735, 737 (D.C. Cir.), *cert. denied*, 368 U.S. 938 (1961).

We find no abuse of discretion in the Tax Court's refusal to continue the May 7 hearing. The court had already continued the hearing twice. Admittedly, Mr. Mar-

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[5] Tax Court Rule 104(c) (emphasis added) provides, in part:

> If a party . . . fails to obey an order made by the Court with respect to the [discovery] provisions . . . , the Court *may* make such orders as to the failure as are just, and among others the following:
>
> . . . .
>
> (3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the case or any part thereof, or rendering a judgment by default against the disobedient party.

golis' sickness was a surprise to everyone. The Tax Court went well beyond its duty in offering, *sua sponte*, to keep the evidentiary record open for Mr. Margolis' testimony after he recovered. The court was not required, however, to wait until ABC felt ready to proceed. ABC had submitted a list of nineteen potential witnesses over a year earlier. Attorneys for ABC presented none of these witnesses at the hearing, although they had over a year to prepare. ABC offered no explanation why none of these witnesses appeared at the hearing. At oral argument before this Court, counsel for ABC conceded that he did not represent to the Tax Court during the conference call of April 30 that Mr. Margolis would be the only witness presented at the May 7 hearing. This explains both the court's willingness to hold the record open for Mr. Margolis and the court's refusal to continue the hearing as to other witnesses. During the April 30 conference call, the Tax Court expressly stated that the May 7 hearing would not be continued. Nevertheless, counsel for ABC chose to appear at the hearing unprepared to call any witnesses.[6] In light of the extended time that had already passed with regard to the documents in question, the Tax Court was fully justified in refusing to continue the evidentiary hearing.

Since the hearing went forward and ABC had no evidence to present, ABC failed to show that the documents did not exist. The trial court was then entitled to impose sanctions for the failure to produce those documents.

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[6] It is somewhat misleading to imply that ABC's attorneys were present at the May 7 hearing. ABC apparently hired Mr. Harlee as local counsel for the sole purpose of appearing to move for a continuance. None of the five attorneys substantively involved in this litigation appeared at the May 7 hearing. Three of these five attorneys were apparently still counsel of record for ABC, and thus professionally responsible for the case.

B. *Dismissal Under Rule 104(c)*

Under Tax Court Rule 104(c), the imposition of sanctions is discretionary with the trial court. We are thus limited on appeal to a review for abuse of that discretion. *See, e.g., Miller v. Commissioner*, 741 F.2d 198, 199 (8th Cir. 1984) (per curiam); *Steinbrecher v. Commissioner*, 712 F.2d 195, 197 (5th Cir. 1983) (per curiam); *see also Oelze v. Commissioner*, 723 F.2d 1162, 1163-64 (5th Cir.) (per curiam), *reh'g denied*, 726 F.2d 165 (1983); *Watson v. Commissioner*, 690 F.2d 429, 431 (5th Cir. 1982) (Tax Court Rule 123(b)). This is apparently the first case to come to this circuit from the Tax Court in which dismissal was imposed as a sanction for failure to comply with a discovery request. We are guided, however, by decisions in this circuit regarding dismissal by the District Court under Federal Rule of Civil Procedure ("Fed. R. Civ. P.") 37.[7]

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[7] Federal Rule of Civil Procedure 37(b)(2) provides, in part:

> If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> . . . .
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party . . . .

We look to our cases reviewing dismissals under Fed. R. Civ. P. 37 because that rule is the exclusive remedy for noncompliance with discovery orders. *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958). It is thus most analogous to Tax Court Rule 104. Indeed, Rule 104 was adopted in its entirety from Fed. R. Civ. P. 37. *See* Tax Ct. R. 104 reporter's note, 60 T.C. 1123-25 (1973); *Fox v. Commissioner*, 718 F.2d 251, 254-55 (7th Cir. 1983).

The standard for reviewing dismissals under Fed. R. Civ. P. 37 emanates from *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976) (per curiam). *National Hockey League* cautions us to circumscribe our review: "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing." *Id.*

Our review is limited not only because of the discretionary nature of discovery sanctions, but because sanctions embody considerations that we must be careful to recognize:

> There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order. It is quite reasonable to conclude that a party who has been subjected to such an order will feel duly chastened, so that even though he succeeds in having the order reversed on appeal he will nonetheless comply promptly with future discovery orders of the district court.
>
> But here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in absence of such a deterrent.

Id. at 642-43. With these limitations in mind, we turn to the appropriate standard a trial court must follow in dismissing a case for discovery noncompliance.

The sanction of dismissal is severe and should be employed only when absolutely necessary to effectuate the considerations noted above. In *National Hockey League*, the Supreme Court found dismissal appropriate when the plaintiffs had not answered crucial interrogatories

in over seventeen months, despite numerous extensions granted "at the eleventh hour." *Id.* at 640. The Court upheld the District Court's findings of "flagrant bad faith" on the part of the plaintiffs and counsel's "callous disregard" of their duties. *Id.* at 643. In *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958), the Court vacated the dismissal of a case in which the plaintiff had refused to comply with a discovery order to avoid violating another country's criminal laws. The Court held dismissal inappropriate "when it has been established that failure to comply has been due to inability, *and not to willfulness, bad faith, or any fault of the petitioner.*" *Id.* at 212 (emphasis added).

We last reviewed this circuit's standard for dismissal under Fed. R. Civ. P. 37 in *Weisberg v. Webster*, 749 F.2d 864 (D.C. Cir. 1984). In that case, the trial court dismissed the plaintiff's action for failure to respond to the defendant's interrogatories. This court affirmed, employing the *Societe Internationale* standard of " 'willfulness, bad faith, or [some] fault.' " *Id.* at 871 (quoting *Societe Internationale*, 357 U.S. at 212). Other cases in this circuit have followed a similar standard. *See Dellums v. Powell*, 566 F.2d 231, 235 (D.C. Cir. 1977) ("some element of willfulness or conscious disregard is still required to justify a sanction of dismissal"); *Von der Heydt v. Kennedy*, 299 F.2d 459, 461-62 (D.C. Cir.), *cert. denied*, 370 U.S. 916 (1962) (bad faith and willful refusal). Taken together, these cases require some finding of culpability on the part of the noncomplying party amounting to willfulness or bad faith to justify dismissal.

For the reasons enumerated above in our discussion of the Tax Court's refusal to continue the hearing, we find that this case was appropriately dismissed. The appellants were fairly warned that they were expected to appear on May 7 and present witnesses, other than Mr.

Margolis, who could testify as to the existence of the documents. ABC has not even attempted to explain why none of these individuals was presented. Rather, ABC deliberately chose to move for a third continuance, even after the Tax Court indicated that such a motion would be denied. ABC's refusal to participate could be no more willful. ABC did not even send attorneys who were familiar with the litigation to the hearing. ABC presented no new facts at the hearing. It apparently held the unrealistic hope that the Tax Court would change its mind for no reason at all. Given the torrid history of this litigation, the inconsistent representations by ABC, the unacceptable delay prior to the May 7 hearing, and the unexplained failure to present evidence at the hearing, we find that ABC's motion to continue the hearing was made in bad faith.

The facts in this case are strikingly similar to those found sufficient to warrant dismissal in *National Hockey League*. ABC's attorneys have exhibited a "callous disregard" of their professional obligation to respond promptly and accurately to an opponent's discovery request. ABC has been granted numerous extensions "at the eleventh hour" and still, after four years of litigation, the status of the documents has not been satisfactorily explained. We find this conduct unacceptable, as did the Tax Court. Accordingly, we find no abuse of discretion.

ABC argues that it falls within the rule of *Societe Internationale*. In that case, however, the Supreme Court excused failure to comply because of inability, not "willfulness, bad faith, or . . . fault." 357 U.S. at 212. ABC argues that its failure to comply was due to inability because Mr. Margolis was unexpectedly hospitalized. But ABC never asserted that Mr. Margolis was the only witness; in fact, it represented quite the contrary in its March 1983 motion for an evidentiary hearing. ABC's failure to comply was in no way due to Mr. Margolis' illness. ABC's failure to comply was solely the result of

its attorneys' unexplained decision not to call any other witnesses at the hearing. If ABC's case rested entirely on Mr. Margolis' testimony, it should have told that to the Tax Court. It is too late in the day to make that claim now.

C. *I.R.C. § 7456(b)*

Since the ruling below is unclear, we also review its propriety under I.R.C. § 7456(b). We find that the Tax Court's order was valid on this theory as well.

Section 7456(b) is clearly designed to remedy the special discovery problems that can arise in litigation with foreign taxpayers. All of the language in § 7456(b) regarding orders is directory. Once the court has found good cause for the production of documents, the court *must* order production of the documents. After a reasonable time for compliance, the court *must* order one of the three sanctions listed in § 7456(b). Each of these sanctions focuses on full or partial dismissal. Under this section, then, the court's discretion is limited to finding good cause, and should the taxpayer not comply with an order to produce, choosing between the three available sanctions: striking pleadings, dismissing the proceeding, or rendering a default judgment.

The parties have not cited, and our research has not revealed, any cases in which the Tax Court has resorted to § 7456(b). The section was added to the tax code when the Internal Revenue Code of 1954 was enacted. The legislative history of the section, however, provides us with no insight into the more subtle aspects of the section. Both the House and Senate Reports on the 1954 Code merely repeat the essential provisions of § 7456(b). H.R. Rep. No. 1337, 83d Cong., 2d Sess. A433 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 613 (1954).

Since the language of § 7456(b) is mandatory, our review is limited to a determination whether the statu-

tory prerequisites are satisfied. There is no dispute that the Commissioner had good cause for seeking the documents. Moreover, ABC does not claim that a reasonable time had not yet passed or that the underlying discovery motion was somehow invalid. Thus, the Tax Court discretion was limited to a choice between the three alternatives available under § 7456(b). The only substantive issues in this lawsuit are whether the trusts were doing business in the United States or whether the trusts were present in the United States when they won the judgment in the California litigation. The Commissioner sought the documents to prove precisely these points. The only sensible sanction, then, was dismissal. A default judgment is inapplicable to this case, and striking out portions of the pleadings would leave ABC with no case, because the relevant portions of the pleadings would be those denying the Commissioner's theories. We thus find the order of dismissal valid under I.R.C. § 7456(b).

CONCLUSION

This litigation presents a prime example of how attorneys should *not* operate. By the time of the May 7 hearing, *five* attorneys had been substantively involved in the case, and only one of them was ill, yet none of these attorneys appeared at the hearing. ABC's attorneys had submitted a list of nineteen potential witnesses over a year earlier, yet none of those witnesses was present at the hearing. While we recognize the difficulty of persuading individuals residing in foreign countries to be witnesses in a lawsuit here, many of those listed by ABC's attorneys as potential witnesses reside in the United States. ABC's attorneys have offered no explanation as to why these individuals did not testify. Moreover, the attorneys did not warn the Tax Court of changed circumstances, if any, that might have justified postponing a hearing as to these other witnesses.

The sanction of dismissal is a harsh one that operates against ABC, rather than against its attorneys. We do not review this case lightly, since we are well aware of the tax liability at stake. Nevertheless, if we are to enforce the mandate of *National Hockey League*, we must penalize the unacceptable delay in this case.

Accordingly, the orders of the Tax Court dismissing these actions are affirmed.

It is so ordered.

Appendix B

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 4813-79

Aruba Bonaire Curacao Trust Company, Limited,
Trustee of Supriano Trust,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called at Washington, D.C., on May 7, 1984, for evidentiary hearing on respondent's motion to impose sanctions, filed November 12, 1982. For cause appearing in the record of the proceedings, it is

ORDERED that respondent's motion to impose sanctions, filed November 12, 1982, is granted and this case is dismissed pursuant to Rule 104(c), Tax Court Rules of Practice and Procedure. It is further

ORDERED and DECIDED that there are deficiencies in income tax due from petitioner as follows:

Taxable Year	Income Tax
1968	$ 3,956.87
1969	$ 1,656.53
1970	$ 8,548.75
1971	$ 6,746.56
1972	$15,464.49
1973	$ 2,430.80

(signed) William A. Goffe
Judge

Entered: June 15, 1984

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 4814-79

Aruba Bonaire Curacao Trust Company, Limited,
Trustee of Shell Trust,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called at Washington, D.C., on May 7, 1984, for evidentiary hearing on respondent's motion to impose sanctions, filed November 12, 1982. For cause appearing in the record of the proceedings, it is

ORDERED that respondent's motion to impose sanctions, filed November 12, 1982, is granted and this case is dismissed pursuant to Rule 104(c), Tax Court Rules of Practice and Procedure. It is further

ORDERED and DECIDED that there are deficiencies in income tax due from petitioner as follows:

Taxable Year	Income Tax
1968	$ 3,956.87
1969	$ 1,656.53
1970	$ 8,548.75
1971	$ 6,746.56
1972	$15,464.49
1973	$ 2,430.80

(signed) William A. Goffe
Judge

Entered: June 15, 1984

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 4815-79

Aruba Bonaire Curacao Trust Company, Limited,
Trustee of Berman Trust,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called at Washington, D.C., on May 7, 1984, for evidentiary hearing on respondent's motion to impose sanctions, filed November 12, 1982. For cause appearing in the record of the proceedings, it is

ORDERED that respondent's motion to impose sanctions, filed November 12, 1982, is granted and this case is dismissed pursuant to Rule 104(c), Tax Court Rules of Practice and Procedure. It is further

ORDERED and DECIDED that there are deficiencies in income tax due from petitioner as follows:

Taxable Year	Income Tax
1968	$ 3,956.87
1969	$ 1,656.53
1970	$ 8,548.75
1971	$ 6,746.56
1972	$15,464.49
1973	$ 2,430.80

(signed) William A. Goffe
Judge

Entered: June 15, 1984

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 4816-79

Aruba Bonaire Curacao Trust Company Limited,
Trustee of Cole Trust,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called at Washington, D.C., on May 7, 1984, for evidentiary hearing on respondent's motion to impose sanctions, filed November 12, 1982. For cause appearing in the record of the proceedings, it is

ORDERED that respondent's motion to impose sanctions, filed November 12, 1982, is granted and this case is dismissed pursuant to Rule 104(c), Tax Court Rules of Practice and Procedure. It is further

ORDERED and DECIDED that there are deficiencies in income tax due from petitioner as follows:

Taxable Year	Income Tax
1968	$ 3,956.87
1969	$ 1,656.53
1970	$ 8,548.75
1971	$ 6,746.56
1972	$15,464.49
1973	$ 2,430.80

(signed) William A. Goffe
Judge

Entered: June 15, 1984

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 9010-79

Aruba Bonaire Curacao Trust Company Limited,
Trustee of Supriano Trust,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called at Washington, D.C., on May 7, 1984, for evidentiary hearing on respondent's motion to impose sanctions, filed November 12, 1982. For cause appearing in the record of the proceedings, it is

ORDERED that respondent's motion to impose sanctions, filed November 12, 1982, is granted and this case is dismissed pursuant to Rule 104(c), Tax Court Rules of Practice and Procedures. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from petitioner for the taxable year 1978 in the amount of $129,549.69.

(signed) William A. Goffe
Judge

Entered: June 15, 1984

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 9011-79

Aruba Bonaire Curacao Trust Company Limited,
Trustee of Supriano Trust,
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called at Washington, D.C., on May 7, 1984, for evidentiary hearing on respondent's motion to impose sanctions, filed November 12, 1982. For cause appearing in the record of the proceedings, it is

ORDERED that respondent's motion to impose sanctions, filed November 12, 1982, is granted and this case is dismissed pursuant to Rule 104(c), Tax Court Rules of Practice and Procedures. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from petitioner for the taxable year 1978 in the amount of $129,549.69.

(signed) William A. Goffe
Judge

Entered: June 15, 1984

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 9012-79

Aruba Bonaire Curacao Trust Company Limited,
Trustee of Cole, Trust
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called at Washington, D.C., on May 7, 1984, for evidentiary hearing on respondent's motion to impose sanctions, filed November 12, 1982. For cause appearing in the record of the proceedings, it is

ORDERED that respondent's motion to impose sanctions, filed November 12, 1982, is granted and this case is dismissed pursuant to Rule 104(c), Tax Court Rules of Practice and Procedures. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from petitioner for the taxable year 1978 in the amount of $129,549.69.

(signed) William A. Goffe
Judge

Entered: June 15, 1984

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 9016-79

Aruba Bonaire Curacao Trust Company Limited,
Trustee of Berman, Trust
Petitioner,

v.

Commissioner of Internal Revenue,
Respondent.

ORDER OF DISMISSAL AND DECISION

This case was called at Washington, D.C., on May 7, 1984, for evidentiary hearing on respondent's motion to impose sanctions, filed November 12, 1982. For cause appearing in the record of the proceedings, it is

ORDERED that respondent's motion to impose sanctions, filed November 12, 1982, is granted and this case is dismissed pursuant to Rule 104(c), Tax Court Rules of Practice and Procedures. It is further

ORDERED and DECIDED that there is a deficiency in income tax due from petitioner for the taxable year 1978 in the amount of $129,549.69.

(signed) William A. Goffe
Judge

Entered: June 15, 1984

Appendix C

In the United States Court of Appeals
For the District of Columbia Circuit
No. 84-5698
Petition for Rehearing
Aruba Bonaire Curacao Trust Company, Ltd.,
Trustee of Supriano Trust, et al.,
Appellants,
vs.
Commissioner of Internal Revenue,
Appellee.

Introduction

Counsel for Appellants states that in his judgment the Court misapprehended a material fact in the opinion decided November 22, 1985 ("the Decision"). A material portion of the Court's Decision is based upon statements made during oral argument. In order to assist the court in reviewing this petition, Appellants have included herein as Appendix A a transcript of the oral argument heard on October 2, 1985 ("the Transcript").

The Misapprehended Facts

One of the most significant factual considerations upon which the Decision rests is a telephone conference call between counsel for Appellee (David L. Denier), the United States Tax Court (the Honorable William A. Goffe) and counsel for Appellants (Robert L. Dunnett. This conference call occurred on April 30, 1984 and is referred to throughout the Decision. Of importance to this Court and the fact that was misapprehended is whether or not counsel for Appellants advised the Tax Court that Mr. Harry Margolis might be the only witness appearing on behalf of Appellants.

The Court states: "At oral argument before this Court, counsel for ABC conceded that he did not represent to the Tax Court during the conference call of April 30 that Mr. Margolis would be the only witness at the May 7 hearing. This explains both the Court's willingness to hold the record open for Mr. Margolis and

the Court's refusal to continue the hearing as to *other* witnesses." (The Decision, p. 11, emphasis supplied)[1]

During oral argument, the following exchange occurred:

> Question (by the Court): Well, are you suggesting then—and only if it is in the record, answer—that had the thing gone ahead and Mr. Margolis had not become ill and had the discovery hearing been held, only Mr. Margolis would have been there?
>
> Mr. Dunnett: That may very well have been—
>
> Question (by the Court): That there wouldn't have been any other *keey* (sic) people? (emphasis supplied)
>
> Mr. Dunnett: the case.
>
> Question (by the Court): Was this made clear to the Tax Court judge on April 30th at the conference call?
>
> Mr. Dunnett: I believe it was, Your Honor, yes.
>
> (Transcript, p. 6:14-25)

During further questioning by the Court, Appellants' counsel again responded that the Tax Court was apprised that Mr. Margolis would be the *primary* witness (Transcript, p. 8:5-6) (emphasis supplied).[2]

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[1] Appellants' counsel was prevented from representing without qualification to the Tax Court that Mr. Margolis would be the *only* witness because of Mr. Margolis' unavailability. (Transcript, p. 8:4-7) However, Appellants' counsel did advise the Tax Court that Mr. Margolis was the *key* (Transcript, p. 6:14-25) and the *primary* witness (Transcript, p. 8:6-7) and that Mr. Margolis may very well be the *only* witness (Transcript, 6:14-25). (emphasis supplied) This Court apparently understood Appellants' statements to the Tax Court as communicating that the hearing could not have gone on without Mr. Margolis. (Transcript, p. 12:9-11)

[2] A portion of the Transcript apparently could not be understood by the transcriber. On page 21, line 6, there are dashes (—) preceding Appellants' counsel's continuing statement, "—and I was present in the telephone conversation and I thought that was communicated to the judge." Appellants believe the key and primary status of Mr. Margolis as

It is upon this apparent misapprehension of fact that Appellants request a rehearing.

Argument

The Court's Decision recognizes that Mr. Margolis' sickness was a surprise to every one. The Decision infers that the May 7, 1984 hearing should have been continued for the purposes of presenting Mr. Margolis' testimony if such a possibility had been presented to the Tax Court during the April 30, 1984 telephone call. As set forth on page 6 of the Transcript, Appellants made clear to the Tax Court that Mr. Margolis may very well have been the *key* and *only* witness (p. 6:14-25). Again on page 8 of the Transcript, Appellants' counsel emphasized to the Tax Court Mr. Margolis' status as a *primary* witness (p. 8:6) (emphasis supplied).

When the statements by Appellants' counsel are read in the context of the entire oral argument, the record before this Court and the information available to the Tax Court, especially the declaration of Appellants' counsel filed in support of the motion for continuance and the declarations of Mr. Margolis filed in support of motions for reconsideration and to vacate the decision, it is obvious that the Tax Court was made aware that Mr. Margolis might very well be the only witness. Under such circumstances and given the stated intention of the Tax Court, the continuance should have been granted with the restriction that only Mr. Margolis' testimony would be presented at the continued date. The Decision infers that this resolution was intended by the Tax Court.[3]

The oral argument, when coupled with the declaration of Appellants' counsel in support of the motion for continuance and

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a witness and the probability he would be the only witness was again expressed to this Court.

[3] The Decision states, "this explains both the [Tax] Court's willingness to hold the record open for Mr. Margolis and the [Tax] Court's refusal to continue the hearing as to *other* witnesses." (The Decision, p. 11) (emphases supplied)

the subsequent declarations of Harry Margolis, identifies clearly that Appellants communicated to the Tax court the distinct possibility that Margolis would be the only witness. In Paragraph 7 of Robert L. Dunnett's declaration (AOB, App. p. 32)[4] he states that Margolis told him (Dunnett) that he (Margolis) had evidence to present at the hearing and found it necessary to testify. Further in the same declaration, the Tax Court is told that Mr. Margolis is the *only* person who had knowledge of what could be presented to the Court in the evidentiary hearing and his physical condition prohibited counsel from receiving instructions, advice or information (AOB, App. p. 36). Thus, Appellants' counsel communicated to the Tax Court that a probability existed that Margolis would be the *only* person testifying. As soon as Mr. Margolis was available, i.e., after he recovered from neurosurgery, motions for reconsideration and to vacate the Decision were filed along with the declaration of Harry Margolis (AOB, App. pp. 78-89, 94-105). The declarations set forth the intimate knowledge that Mr. Margolis possesses regarding these matters and specifically states that he could testify in detail with regard to these matters ". . . with more knowledge than any other person of whom I am presently aware concerning the creation of the petitioning four trusts, the functioning of the trusts since their creation, including specifically trust participation in the transaction involved in these petitions, the various elements of accounting material that were and were not available for the trust, why they were not available, an explanation of Exhibits A, B, C, D and E which are attached to respondent's motion to impose sanctions, and any and all other matters and facts concerning these transactions." (AOB, App. p. 88, 104). Exhibits A, B, C, D and E referred to in the declaration include Mr. Margolis' October 19, 1982 letter; the very letter referred to in the Tax Court's order of March 23, 1983; the letter that allegedly raised possible inconsistencies; the letter that was the basis of Appellee's motion for sanctions; and the letter that was written and signed by Mr. Margolis.

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[4] References to Appellants' Opening Brief shall be abbreviated "AOB" and "AOB, App." for the Appendix.

Thus, the Tax Court was made aware during the telephone conversation of April 30, 1984, in the motion for continuance, and in the motions for reconsideration and to vacate the decision that Mr. Margolis would testify to exactly what the Tax Court requested in its March 23, 1983 order, that is, an explanation of the October 19, 1982 letter.

Conclusion

On page 16 of the Decision, this Court states that "If ABC's case rested entirely upon Mr. Margolis' testimony, it should have told that to the Tax Court." ABC did so. It did so in the phone conference of April 30, 1984, it did so in the declaration of counsel requesting a continuance, and it did so in the declarations of Mr. Margolis supporting motions for reconsideration and for vacating of the Tax Court's decisions. The evidentiary hearing should have been continued to receive the testimony of Mr. Margolis. This conclusion is apparently confirmed by the Court's statement in the Decision, "This explains both the [Tax] Court's willingness to hold the record open for Mr. Margolis and the [Tax] Court's refusal to continue the hearing as to *other* witnesses."[5]

Dated: December 12, 1985.

Respectfully submitted,

ROBERT L. DUNNETT
Robert L. Dunnett
Attorney for Appellants

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[5] If, as apparently recognized in the Decision, the Tax Court intended to continue the hearing only for the testimony of Mr. Margolis, this intent was not stated in the Tax Court's Decisions. The Tax Court Decision's could be affirmed with instructions to provide an opportunity for Mr. Margolis to testify before such Decisions become final. Such disposition would allow the Tax Court to consider whether or not the Decision should be modified in light of Mr. Margolis' testimony.

TRANSCRIPT OF PROCEEDINGS
In the United States Court of Appeals
for the District of Columbia Circuit
No. 84-5698
Aruba Bonaire Curacao Trust Company, Ltd.,
Trustee of Supriano Trust, et al.,
Appellants,
v.
Commissioner of Internal Revenue,
Appellees.
Wednesday, October 2, 1985
Washington, D. C.

The above-entitled matter came on for oral argument, pursuant to notice, at 11:00 a.m.

Before:

Chief Judge Robinson, and

Circuit Judges Wright and Wald

Appearances:
Robert L. Dunnett, Esq., Dunnett, Bays & O'Connell,
P. O. Box 1847, Los Gatos, California 95031;
on behalf of Appellants
Jonathan S. Cohen, Esq., Tax Division,
Department of the Treasury, Washington, D. C. 20530;
on behalf of appellees

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PROCEEDINGS

The Clerk: Case No. 84-5698, Aruba Bonaire Curacao Trust Company, Limited v. Trustee of Supriano Trust, et al., Appellants, v. Commissioner of Internal Revenue.

Robert L. Dunnett, Esq., for appellants, and Jonathan S. Cohen, Esq., pro hac vice.

The Court: Mr. Dunnett.

ORAL ARGUMENT OF ROBERT L. DUNNETT, ESQ., ON BEHALF OF APPELLANTS

Mr. Dunnett: I am Robert Dunnett, Your Honors. I am appearing for the appellants today.

The issue to be examined in this appeal is the propriety of the punishment that was suffered by the appellants because of their inability to proceed with the discovery hearing. The hearing was scheduled to be heard on May 7, 1984, before the United States tax Court.

The appellants appeared at the hearing and moved for a continuance which was denied and the sanction which was imposed was the dismissal of the case. The appellants requested this continuance based upon the unavailability of Mr. Harry Margolis. Mr. Margolis was to be a witness at the hearing and was the basis for the motion for continuance which was denied.

In adding whether that continuance should have been denied and whether the sanction of dismissal should have been imposed upon the appellants, one has to examine the importance of Mr. Margolis as to the proper presentation of the appellants' case.

And here I think it is important to start with recognizing the status of Mr. Margolis at the time of that hearing. Mr. Margolis had originally been counsel for the appellants in these matters. There came a time in the course of the cases when, contrary to what Mr. Margolis had envisioned as the case being fully stipulated and submitted to the court, it appeared there would be extensive factual matters involved. He recognized that he would have to be a witness in these cases and withdrew as counsel. He

withdrew in 1982. That is his status when we come to the May 7, 1984 hearing. It was not one of counsel but one of a witness.

The importance of Mr. Margolis as a witness on the record before us can be seen by the court's order entered March 23rd of 1983. When that order is examined, we find that the court stating its order that it considered very carefully the entire record of the case, and in that consideration found that there were perhaps some inconsistencies in some of the positions taken by appellants' counsel before the court, and it went on in its order to identify a specific instance in which it was interested and that particular instance was a letter dated October 19, 1982, as cited in the order that precedes the May 7th hearing.

It identifies the letter, which is a letter from Mr. Margolis to the then counsel for appellants, Mr. Coffin, in which he transmits some documents. The letter was delivered to counsel for respondents on October 20th and the letter itself identifies three named parties, Mr. Coffin, Mr. Denier, each being counsel for the respective parties, and Mr. Margolis and other names mentioned in that letter. It is this letter to which the court directed particular attention. It is this letter that forms one of five exhibits for the respondents' motion for sanctions. This letter and the other four exhibits each authored by Mr. Margolis were letters signed by Mr. Margolis.

This was the letter which needed to be explained at the May 7th hearing.

Question: Let me cut in, if I might, Mr. Dunnett. This had been going, there had been a lot of delays for one reason or another, many legitimate, on this discovery hearing, and then shortly before Mr. Margolis got sick, if I understand it, petitioners submitted a list of witnesses that they were going to call at the discovery hearing and the court scheduled it for June and it got postponed again. Mr. Margolis got sick and then the court said on April 30th, I am going to go ahead and hold it anyway, I will keep the record open for Mr. Margolis' testimony at some later date.

Why wouldn't the correct thing have been, even though you might have been at a disadvantage by Mr. Margolis' unavailability, to go and do the best you could at the hearing and then leave

the record open, rather than simply say, well, it is all over, we are not going to do anything?

Mr. Dunnett: Well, I think, Your Honor, the response to that is that the witness list that is referred to in the brief was prepared by Mr. Coffin and I think it has been expanded to something that it wasn't intended to be.

If you review the motions filed by Mr. Coffin, what he said in there was that he was going to call these as potential witnesses and that he was going to attempt to contact these people. What we are looking at is the lapse of 15 to 20 years in time for an inactive company.

Question: Well, are you suggesting then—and only if it is in the record, answer—that had the thing gone ahead and Mr. Margolis had not become ill and had the discovery hearing been held, only Mr. Margolis would have been there?

Mr. Dunnett: That may very well have been—

Question: That there wouldn't have been any other key people?

Mr. Dunnett: the case.

Question: Was this made clear to the Tax Court judge on April 30th at the conference call?

Mr. Dunnett: I believe it was, Your Honor, yes.

To finish responding to Your Honor's question, you will note that after Mr. Coffin filed the witness list, intending to cover everybody, obviously being cautious and maybe a bit optimistic about their availability, the record will show that letters were sent to these people and that at least in some cases responses were received and some of the witnesses—Mr. Colloms in England is over 80 years old and is suffering from a heart ailment which wouldn't allow him to travel, and another gentleman was in Hong Kong and I think it became—

Question: I guess it is hard for me to understand this, but after Mr. Margolis became ill and the seriousness of his condition was known, that a conference call was held with the Tax Court judge and everybody had laid everything on the table and said,

look, we have only got one witness and he is in dire straights. It is hard for me to believe that if that all had been laid out on the table that the Tax Court judge would have said, well, we are going to have the hearing anyway.

Mr. Dunnett: Well, communication sometimes gets fuzzy when you have three phone connections, but at least it was my impression that it was made clear to the court that Mr. Margolis was an important witness as well as an important person who helped prepare—

Question: Was important, but was it made clear that he in effect was the sole, only witness to explain whatever records—

Mr. Dunnett: I don't think at the time of that call that the appellants made the statement that he would be the only witness at the hearing if it were held, but he certainly would be the primary witness. He is the one that has to explain the documents that were at issue.

I think that the importance of Mr. Margolis at this particular hearing is illustrated throughout the record and I tried to address the fundamental documents which show his importance. Even if the communication which Judge Wald referred to by telephone was interpreted differently by the parties, certainly—

Question: Were there some documents that had been compiled in preparation for the discovery hearing prior to Mr. Margolis' becoming ill?

Mr. Dunnett: Your Honor, there were in this case—

Question: —I mean for this particular discovery that he was going to talk about and explain and elaborate on.

Mr. Dunnett: Yes, I think that he was—as I said, pursuant to the March 23, 1983 order that the court specifically asked for an explanation of the October 19, 1982 letter which Mr. Margolis had sent which enclosed accounting material. That was the material to which Mr. Margolis was—

Question: Did anybody suggest to the Tax Court judge, to offer him, to say, well, we have these documents and Mr. Margolis is the only person who can explain them but at least this

is evidence of our good faith, here they are and if you will keep the record open so that he can come in at a later time and explain them—I get the notion that they just said we can't have a hearing and we—

Mr. Dunnett: No, that wasn't the notion and I think the motion for a continuance speaks to the fact that there were the documents before the court. In fact, these documents were there, they weren't something new that were added. They were there along with—

Question: They just needed to be explained?

Mr. Dunnett: Yes, and in this case, Your Honor, there are over 39 boxes of material in which the accounting for these particular matters have been exhausted time and time again. Those were all supplied and reviewed by the government. It is not a case of documents that were not provided. Many, many documents were provided. It was just a single focus on—as I read the record, a single letter of October 19, 1982 that required explanation by Mr. Margolis.

I think that the documents that not only were mentioned in the court's order of proceeding but were also relied upon by respondent in his motion for sanction, were all documents authored by Mr. Margolis, and under the circumstances it was appellants' position that they had little choice but to request a brief continuance until Mr. Margolis recovered from his surgery.

I don't think there is any question raised either by respondents or appellants that Mr. Margolis was indeed unable to attend that hearing and that it came rather suddenly, within three days of when the hearing was ordered, that seizures commenced, and under these conditions I believe that the appellants shouldn't suffer the punishment of having their cases dismissed, but that the continuance should have been granted and allowed to have their day in court.

The Court: Did you want to reserve?

Mr. Dunnett: I did wish to reserve a few moments.

The Court: Very well, you may do so.

Mr. Cohen.

ORAL ARGUMENT OF JONATHAN S. COHEN, ESQ., ON BEHALF OF APPELLEES

Mr. Cohen: I will be very brief. It seems to me that if I were going to sum up this case from the standpoint of the perspective of not just the Commissioner but also from that of the Tax Court, that I could do it in the words "enough is enough."

This case began, after all, with a determination that was pegged to a couple of technical tax issues, whether ABC Trust was doing business in the United States and, if it was, what was its method of accounting, because if it was doing business in the United States it received money in the United States and when would it be taxable.

In order to determine those tax issues, the Commissioner requested documents. The first informal request was made in April of 1980. They basically were not very complicated requests, although anytime when deals with Harry Margolis' system of accounting, the nature of those arrangements are complicated in the extreme. Basically, the Commissioner wanted the trust documents, books and records of ABC, it wanted the systems accounting. The systems accounting is a term of art when dealing with Mr. Margolis' arrangements.

In any event, not all of that was forthcoming, although 39 boxes of documents were produced. The formal document request by way of motion was made by the Commissioner in May of 1980, more than five years ago. It was made pursuant to a special statute, section 7456(b) of the Code, that is specifically designed to authorize, indeed require, because the language of the statute is not made by the Tax Court, it is authorized to impose sanctions and they are severe, default and dismissal of the petitions, among others, more severe than the Federal Rules of Civil Procedure sanctions of Rule 37, where there is a foreign taxpayer who refuses to produce documents in the tax—

Question: Let me get to the core of it for me. It may well be that the Commissioner, under 7456 or the Tax Court, et cetera, could have pulled the rug out on the theory of delay, but the

critical question becomes why now, why pull it out when the man is in serious non compos mentis in a hospital? What was the validity for using that particular triggering point, unless, as I questioned opposing counsel and he suggested it was not true, one could say that this hearing could have gone on without Mr. Margolis, that some good-faith attempt could have been made to continue it, otherwise this indeed was the sole and exclusive focus of that hearing, to try to figure out if the man was in very serious condition in a hospital, you could say okay, now is the time we are going to suddenly pull up?

Mr. Cohen: There are two levels of response to that question. The first is why indeed did it pull the rug out at the time it did. A strong case could be made that the judge should have pulled the rug out a lot earlier.

Question: That is not the question.

Mr. Cohen: Okay. But it seems to me, given the nature of what happened, the Tax Court was patient, indeed to a fault, and offered the evidentiary hearing. Now, if you go to the record appendix that is clipped into the back of Mr. Dunnett's brief at pages 060 and 061, you will see Judge Goffe reciting what has happened in the course of these—

Question: May I have the reference again?

Mr. Cohen: 060, in the lower right-hand margin. There is different numbering at the top of the page, but mine is numbered 060 and 061 to the appellants' brief, not the supplemental.

The judge said, look, I have studied this and I have had a call with Mr. Dunnett and Mr. Denier, who was the IRS lawyer, and he said I made it clear that I wouldn't continue this hearing. He had heard about Harry's illness, he had seen the proposal that there would be 19 or 20 witnesses, these were people who were supposed to be made available from Hong Kong, Great Britain, the Bahamas—all of this to resolve one rather simple question, if the records existed, why weren't they being produced, or did the records not exist at all.

There had been representations made that were, to put it mildly, conflicting on this point. On several occasions there would

be communications from Harry and his people that "we are doing our best to get the records, we are having trouble reconstructing the records, we are going to need consent from interested parties before we can produce the records."

At other times there were representations that "the records aren't around, we don't know where they were, they were lost or destroyed, I wasn't the custodian of them, someone else was, someone else is will or unavailable."

The judge made it very clear that if the records sought by the Commissioner were not available, he would not impose sanctions, they didn't exist then that was the end of the matter. But he said on these representations you don't need Margolis as an attorney, he has already long withdrawn, if you want to present him as a witness to clarify things, I will hold the hearing open, but you have had time and time and time again to get your act together and to show me why you can't produce those documents, and what you are going to tell me now—and this is reading into what Judge Goffe said, and it is certainly understandable when you see the scenario—is that you want more time or yet another delaying, dilatory stalling tactic. If the documents don't exist, then for god's sake, just say so, and we will call the whole thing off.

Question: But who would know that? Who would know that besides Mr. Margolis?

Mr. Cohen: Well, the answer seems to be that for all of the years from 1980 on before Harry got sick, before he was stricken, when he was representing that "I am doing my best to comply with these, I am going to have these reconstructed but I am running into trouble," and Mr. Dunnett worked for eleven years for Harry. He is no stranger to this litigation. He is no stranger to these demands.

Part of moving these records offshore was obviously one of the reasons why the Tax Corut felt that these sanctions were appropriate, they could not be reached, they were not being produced. You come into the Tax Court and you challenge the determination without paying the tax up front, the way the Tax Court proceedings work, and at the same time you stonewall the Commissioner by saying "I won't produce the documents."

Now, I think that four years was pretty patient. I don't know of any other cases in which the Tax Court has done it, so I can't give you comparable precedence. But, of course, you as the reviewing Court are guided by a standard of was this or was it not an abuse of discretion of Judge Goffe to say no more continuances, if you want Harry, if you need Harry, I will hold the record open for him, but there aren't going to be any more continuances, you have sent me a list, you have told me what your problems are, now go forward with it, fish or cut bait. And they turned and said we will cut, we will leave, we won't go forward with the hearing, and now the relief they want is for this Court to send it back for the May 7th hearing to go forward all over again, it now being 15 or 16 months from May of 1984, and on and on and on.

Question: Is it your understanding of the record that until the day of the aborted hearing, the Tax Court Judge or maybe you yourself as opposing counsel—

Mr. Cohen: I was not advising—

Question: —that the IRS did not know that Margolis was the only witness they planned to call, that there wouldn't be any other kind of presentation?

Mr. Cohen: I think that is a fair inference. If you look through the colloquy at the time of the hearing between the judge—

Question: I did, at page 66.

Mr. Cohen: Right. I was going to say they sent in this motion with all of these things and he says that Margolis will testify, and Harllee, who was apparently brought in at the last minute to handle this, says, "Well, one is the question of—there are two points, one is the question of how important Margolis is as a witness, I am some handicapped and I don't know." There is another, and that is he was originally the tax planner and so the judge says who is the attorney here and we go on.

The court and IRS counsel, Denier, Dave Denier, apparently were under the impression that this evidentiary hearing was going to be a pretty big deal, a pretty full-blown affair, with lots of witnesses, and then there is a conference call—and I, of course,

wasn't party to that, so I don't know exactly what happened, but it seems quite clear that the judge was apprised of Harry's illness and he said, "Okay, if he is that important to you, I will hold the record open, but I am not going to hold this hearing, postpone the hearing any further."

Now, that clearly implies that Harry wasn't going to be the only item on that agenda at the hearing and it appears quite clear that Mr. Coffin had submitted an agenda for the hearing, a substantial list of witnesses.

So I think it is fair to say that at the time the hearing was about to start on May 7, 1984, the Tax Court and the IRS were not of the view that this was Harry or nothing.

If the Court has not further questions, I think I will sit down. Thank you.

The Court: Mr. Dunnett.

ORAL ARGUMENT OF ROBERT L. DUNNETT, ESQ., ON BEHALF OF APPELLANTS—REBUTTAL

Mr. Dunnett: Thank you, Your Honor. First of all, I would like to clear up one inaccuracy which is important here, and that is the fact that this is a Tax Court case. I think it was represented in oral argument that that means that no taxes are paid until such time as the case is determined. That is the usual case. That is not the case here.

There is over $600,000 sitting in the United States District Court for the Central Division of Los Angeles which was seized by the government and is sitting there waiting the outcome of this case. This isn't a case where the money is in the pockets of the taxpayer, it is in the Federal District Court.

Secondly, the aura of stonewalling that has been mentioned in this particular case and the system of accounting that was alluded to, these were all reviewed for many years of litigation in the 1970's down in Ventura County. And in the boxes provided to the government were systems accounting prepared by Sheldon Lewis. They were there. There was no stonewalling it. They had all the documents.

The distinction here between proceeding under 7456(b) and what the court ultimately proceeded under, 104(c), I dont think that it matters because I think you still get to the question of how important was Margolis to the particular disposition of the motion to continue.

At the very most, as far as a sanction to be applied to this case, it appears from the arguments in brief and here orally that if a sanction were to be imposed in its most stringent manner, it should have been no more witnesses will be allowed, the case will be continued until you can present Mr. Margolis.

Appellants don't agree with that, but there should be no more stringent sanctions than that, because the Court said that was its position in any event.

Question: I am interested in one point that Mr. Cohen made. He said that it all come down to a simple question in the end, do you have records or do you not have records and are they not—is it your position that even as late as that, when Mr. Margolis actually became unable to communicate or help out in the hearing, that even that kind of a bottom line question couldn't be answered by counsel or somebody who came to the hearing and said there are some records and they are here or we made these efforts to get the records and they couldn't be gotten, none of that could have been presented by counsel without Mr. Margolis being there?

Mr. Dunnett: Well, I think all of that had earlier been presented and part of the confusion that arose was the fact that the appellants were saying you have got all the records we have and the appellees were saying no, there is more because of this inconsistency in the letter, and the only person that could explain that inconsistency was Mr. Margolis.

The fact of the records themselves, as was mentioned, I have personal involvement in the case, these records were gathered in 1976 and '77 from various places in California and elsewhere, were all accumulated in a trial in Ventura County and were all given to the government. This wasn't a case of non-compliance. This is a case of partial compliance, which is really an understatement. There was total compliance. The only thing that needed to

be cleared up was why there was this apparent inconsistency that led someone to believe that there were records elsewhere, and that is what Mr. Margolis had to speak to, and the appellants shouldn't have to suffer dismissal for his having a brain tumor. He ought to be able to present the explanations to the very letter that the court is interested in, that the respondents below said form the basis of their sanction.

The matter should be returned and the hearing held for Mr. Margolis to testify, which he is now able to do.

Question: Couldn't that have been made—he brought in new counsel on the morning of that hearing and if I read the record they had just been notified and they didn't seem to know all the intricacies understandably, said we are not sure why Mr. Margolis is—given the critical nature of this, wouldn't it have made more sense to bring in somebody experienced with this case, to come in and lay before the Tax Court why he was so critical and why there was no alternate person?

Mr. Dunnett: Well, there are a number of responses to that. First, I was called into the case after the order was set, sometime in mid-April, when it became apparent that Mr. Margolis was not going to be able to communicate with counsel who was then in a case over 400 miles away.

The second part is that at least from my perspective—and I was present in the telephone conversation and I thought that was communicated to the judge.

The third matter is that Mr. Harllee was also involved in these cases in 1979 when the funds were seized and actually placed on deposit in Los Angeles. The proceeding was commenced in this district, and Mr. Harllee handled the case and did have some familiarity with it. And given the circumstances of a Monday hearing and a Friday decision and some of the exigencies created by sudden illness, it was determined that Mr. Harllee could properly present the appellants for the purpose of making a motion to continue.

Thank you, Your Honors.

The Court: Thank you, counsel. The case is submitted.

(Whereupon, at 11:30 a.m., the case in the above-entitled matter was submitted.)